Supreme Court, U.S.
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No. 93-596

In The

Supreme Court of the United States

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October Term, 1993

EDWARD BONTKOWSKI,

Petitioner,

vs.

FIRST NATIONAL BANK OF CICERO,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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I

STATEMENT OF THE CASE

Respondent[1] respectfully refers the Court to the detailed factual statement presented by the Seventh Circuit in its opinion (Pet. at A-1 to A-3)[2] for an objective statement of the basis for its decision. Respondent also refers the Court to two other Seventh Circuit decisions involving the same factual background on which petitioner bases his claim. *Bontkowski v. United States*, 850 F.2d 306 (7th Cir. 1988) and *United States v. Bruun*, 809 F.2d 397 (7th Cir. 1987).

Petitioner's Statement of the Case fails to note a crucial point: even under the accrual test for civil RICO actions that he espouses, his claim would still be time-barred. Petitioner seeks review to have this Court adopt the accrual test set out in *Keystone Insurance Co. v. Houghton*, 863 F.2d 1125 (3rd Cir. 1988) as the rule to be applied in determining when the statute of limitations begins to run.

In the present case, the Seventh Circuit followed its earlier ruling in *McCool v. Strata Oil Company*, 972 F.2d 1452 (7th Cir. 1992). In *McCool*, the Seventh Circuit first adopted an accrual test for civil RICO claims based on the simple discovery rule: "a RICO claim accrues when the plaintiff discovers her injury, even if she has not yet discovered the pattern of racketeering." *Id.*, 972 F.2d at 1465.

Given this precedent, the Seventh Circuit rejected the "last predicate act" test applied by the district court in dismissing petitioner's complaint and applied its ruling in *McCool*, a ruling

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1. As disclosed in its appellee's brief filed in the United States Court of Appeals for the Seventh Circuit, respondent First National Bank of Cicero is wholly owned by Pinnacle Banc Group, a publicly held corporation.

2. The Seventh Circuit's opinion may also be found at 998 F.2d 459 (7th Cir. 1993).

that is in line with the majority of courts. *Bontkowski v. First National Bank of Cicero,* 998 F.2d 459, 461 (7th Cir. 1993).

As a second basis for its ruling, the Seventh Circuit also found there was no reason to equitably toll the statute of limitations as petitioner had argued below because a reasonable person in petitioner's position would have discovered the elements of his RICO cause of action if he had been diligent in his inquiry following his April, 1984 indictment. *Id.,* 998 F.2d at 462. Petitioner ignores this additional basis for the Seventh Circuit's decision and appears to have abandoned any argument for tolling the statute of limitations under whatever accrual test is applied.

Finally, the Seventh Circuit rejected petitioner's argument that the *in pari delicto* defense applied to this case. The court properly ruled that no court had ever found the bank guilty of any wrongdoing, and that the object of the loan scheme for which Botkowski and the others were indicted was actually to defraud the bank. *Id.,* 998 F.2d at 462. Again, petitioner does not challenge this additional basis for the Seventh Circuit's ruling.

REASONS FOR DENYING THE WRIT

I.

EVEN UNDER THE ACCRUAL TEST ESPOUSED BY PETITIONER, HIS CLAIM IS TIME-BARRED.

Petitioner seeks reversal solely on the issue of what accrual test should be applied. Yet, the application of the accrual test he favors would have no effect in this case. Though the Seventh Circuit followed its ruling in *McCool* and applied a simple discovery rule, even if the court had applied a modified discovery rule as petitioner argues, his claim would still be barred.

In its opinion the Seventh Circuit found that the "predicate

acts" on which petitioner based his RICO claim occurred (as alleged in the complaint) on February 26, 1982 (wire fraud), March 26, 1982 (possession of stolen securities) and April 6, 1982 (possession of stolen securities). *Id.*, 998 F.2d at 461. The court further found petitioner knew or should have known of his injury when the bank called his loan later in 1982 following the FBI's seizure of the securities he had pledged to the bank as collateral for his loans. *Id.*, 998 F.2d at 461. Indeed, the court found that petitioner admitted that he first learned of his injury when the bank called his loans in 1982 resulting in his bankruptcy. *Id.*, 998 F.2d at 462. Accordingly, the Seventh Circuit found that under its earlier ruling in *McCool*, petitioner's claim was barred because he knew of his injury in 1982 and he did not file his complaint in this case until 1991. *Id.*, 998 F.2d at 461-62.

Under the accrual test adopted by the Third Circuit in *Keystone Insurance Co. v. Houghton*, 863 F.2d 1125 (3rd Cir. 1988), petitioner would also be barred. In *Keystone*, the court ruled that the period of limitations for a civil RICO claim begins to run when the plaintiff knew or should have known that the elements of a civil RICO cause of action existed, unless, as part of the same racketeering activity, there is further injury to the plaintiff or further predicate acts occur which are part of the same pattern. *Id.*, 863 F.2d at 1126.

Here, in addition to his loan having been called in 1982 and his bankruptcy, petitioner was indicted by a federal grand jury in April, 1984 in a twenty-five count indictment for what the Seventh Circuit described was the "loan scheme." *Id.*, 998 F.2d at 460. Thus, by April, 1984, the three predicate acts had already occurred and petitioner's latest injury *i.e.*, his criminal indictment, had occurred. When petitioner was indicted in 1984 for his involvement in the loan scheme, he certainly knew or should have known of the elements of his purported RICO cause of action against the bank. The elements of his cause of action, according to his complaint, had occurred two years earlier in the period

February to April, 1982. Petitioner did not allege further predicate acts or injury following his indictment in 1984 that would have extended the period of limitations as in *Keystone*. Consequently, even under the accrual test in *Keystone*, petitioner's claim is barred. Granting certiorari to adopt the Third Circuit's accrual test simply will not change the outcome of this case.

Petitioner argues before this Court as he did below that he did not learn that the securities he had pledged as collateral to the bank for his loans were stolen until sometime in 1988 when he first read an affidavit of an employee of the Securities Information Center filed in another lawsuit. Unfortunately, petitioner cannot deny that he was charged along with seven others in an indictment in April, 1984 for, among other things, transportation of stolen securities in interstate commerce. *United States v. Bontkowski,* 850 F.2d 306, 308-09 (7th Cir. 1988); *United States v. Bruun,* 809 F.2d 397, 400, 403 (7th Cir. 1987). Petitioner certainly knew then or should have known that there was a question about the securities he had pledged to the bank. Petitioner cannot legitimately contend he did not know or should not have known until 1988 that the securities were stolen given these well-established facts found to exist by the Seventh Circuit. The Seventh Circuit properly ruled that petitioner's civil RICO claim was barred given the age of these facts relative to the filing of his complaint in 1991.

II.

THOUGH THERE IS CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL AS TO WHEN A CIVIL RICO CLAIM ACCRUES, THIS CASE IS NOT THE VEHICLE TO RESOLVE THAT CONFLICT GIVEN THE STALENESS OF PETITIONER'S CLAIM.

Respondent recognizes that there is a conflict among the various circuits in determining when the statute of limitations begins to run in a civil RICO claim. *Compare Rodriguez v. Banco*

Central Corp., 917 F.2d 664 (1st Cir. 1990); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2nd Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); *Pocohontas Supreme Coal Co., Inc. v. Bethlehem Steel Corp.*, 828 F.2d 211 (4th Cir. 1987); *Compton v. Ide*, 732 F.2d 1429 (9th Cir. 1984); *State Farm Mut. Auto Ins. Co. v. Ammann*, 828 F.2d 4 (9th Cir. 1987) *with Keystone Insurance Co. v. Houghton*, 863 F.2d 1125 (3rd Cir. 1988); *Granite Falls Bank v. Henrikson*, 924 F.2d 150 (8th Cir. 1991); *Bath v. Bushkin, Gaims, Gaines & Jonas*, 913 F.2d 817 (10th Cir. 1990); *Bivens Gardens Office Bldg., Inc. v. Barnett Bank of Florida, Inc.*, 906 F.2d 1546 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 1695 (1991).

Nevertheless, this is not the case to end that debate because under any of the accrual tests that have been adopted, petitioner's claim would be barred. Therefore, unless the Court wishes to establish a wholly different accrual test that might salvage petitioner's claim, this is not the vehicle to establish a universal accrual test for civil RICO actions.

Despite the untimeliness of his claim, petitioner contends the Seventh Circuit's accrual test is unfair because the statute of limitations could expire before a plaintiff knows that she is the victim of a racketeering act. To the contrary, the Seventh Circuit expressly held in *McCool* (and followed that holding here) that a claim might not accrue until after an injury has occurred. The court stated in *McCool:*

> There must, of course, be a pattern of racketeering before the plaintiff's RICO claim accrues, and this requirement might delay accrual until after the plaintiff discovers her injury.

Id., 972 F.2d at 1465.

The Seventh Circuit clearly envisioned instances when a party discovers her injury before the pattern of racketeering activity is complete. In such instances, accrual of the claim is delayed until the pattern of racketeering is complete.

In the present case, petitioner alleged in his complaint a pattern of racketeering activity, including three predicate acts that occurred, as the Seventh Circuit found, on February 26, 1982, March 26, 1982 and April 6, 1982. *Bontokowski,* 998 F.2d at 461. Following these predicate acts, petitioner was injured when his loan was called, he was forced into bankruptcy (both in 1982) and, finally, he was indicted and convicted in 1984. Thus, there is no unfairness to the Seventh Circuit's rule as it applies to this case because all of the elements of petitioner's RICO claim occurred, by his own complaint, prior to his injury. Accrual of his claim was complete in 1984.

Furthermore, the Seventh Circuit also allowed in *McCool* for a "separate accrual" rule or new causes of action following each separate injury. *McCool,* 972 F.2d at 1465. Unfortunately, here petitioner did not allege a separate injury following his indictment and conviction in 1984.

In short, petitioner's claim was properly found by the Seventh Circuit to be barred. The conflict as to when a civil RICO claim accrues should be resolved in a case where the outcome might be different given the accrual test applied. There can be no difference in the present case given the evident staleness of petitioner's claim.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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